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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 194

ANGELINE DEBARTOLO,

Petitioner,

vs.

VILLAGE OF OAK PARK, A MUNICIPAL CORPORATION,

Respondent.

BRIEF OF THE RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

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STATEMENT OF THE CASE.

The issues are incorrectly set forth in the petition and brief of the Petitioner. The facts have been given in a disconnected manner, with many of the leading facts either omitted or erroneously given. Accordingly, it is necessary for the Respondent to state the issues and to give a statement of the facts as borne out by the record.

The Issues.

The complaint filed by the Respondent in the trial court (R. 1-10) gave the legal description of her property and its physical appearance. (R. 2.) It alleged that applica-

tion had been made to the Building Commissioner of Oak Park to re-model the second floor of her property so that the second floor might be used as a separate apartment (R. 3); that the application was refused (R. 3); and that the action of the Building Commissioner is illegal and in total disregard of the plaintiff's rights "in her property, and in contravention and in violation of both the State and Federal Constitution." (R. 4.) Following that it describes the boundaries of Oak Park and the streets in the neighborhood of the plaintiff's property. (R. 5.) It then alleges that there is a zoning ordinance in Oak Park defining, among other things, a "Residence District A"; and that the plaintiff's property had been placed in a Residence "A" district although it was "potentially" for occupancy by more than one family and although other multiple dwellings "are located in the same block and other blocks adjoining property of plaintiff." It describes with more detail the multiple dwellings in the same block and along nearby streets (R. 7) and gives the details of a commercial zone immediately to the south of the property. (R. 8.) These factual allegations are followed by the allegation that the action of the Village Board "in its determination to enforce said ordinance against the plaintiff and her property, under the facts herein stated, is discriminatory and unreasonable in the extreme" (R. 8); and that the ordinance in prohibiting the use of the property as a two family residence "takes and damages the property of the plaintiff without compensation, and deprives the plaintiff of her liberty and property without due process of law, and denies to the plaintiff equal protection of the laws and is therefore unconstitutional and void so far as it operates."

The sole witness offered by the plaintiff to establish the allegations in the complaint was her attorney of record

in the trial court and in the Illinois Supreme Court. The Illinois Supreme Court severely criticized him for acting in the dual capacity of attorney and witness. (R. 66.) His testimony (R. 22-52) dealt almost entirely with the presence of multiple dwellings in the area; a description of the commercial zone to the south of the plaintiff's property; and the identification of photographs of the property. His sole testimony regarding the "potentiality" of the property as a two flat was a brief sentence that "The top floor has one finished room, and there is an outside stairway leading up to that second floor." (R. 29.)

At the conclusion of the evidence the trial judge stated that the plaintiff was entitled to the relief sought in the complaint because "this property does abut or adjoin commercial property on Roosevelt Road within thirty feet thereof and that from all the facts and circumstances in evidence, it is the court's opinion that the Zoning Ordinance in question as to such premises does operate as a hardship and is invalid as to such premises."

The decree, in general, follows the allegations of the complaint in an abridged form. (R. 15-21.) In brief, it found that there was a commercial area immediately to the south of the plaintiff's property (R. 18); that there were multiple dwellings located in the same block as the plaintiff's property and in the surrounding area (R. 18-19); that there would be no substantial change in the structure or outward appearance of the property to complete the construction of an apartment on the second floor (R. 19); that the restrictions of the zoning ordinance to prohibit the use of the property as a two family residence are not necessary to secure adequate light, pure air and safety from fire (R. 19); that the ordinance as applied to the plaintiff's property has no relation to public health, morals or general welfare (R. 19); that the ordinance as applied to

the plaintiff's property is unreasonable and arbitrary; that the ordinance has denied the plaintiff the privilege of using the property as a two family residence; and that in so far as the ordinance deprived the plaintiff from using the property as a two family residence, it was unconstitutional. (R. 20.)

The Facts.

The opinion of the Illinois Supreme Court gives a painstaking recital of the facts. The Petitioner is not in serious disagreement with the facts found by the court. For that reason, the statement of facts which we hereinafter give is a summary of the facts in the opinion of the Illinois Supreme Court.

On September 21, 1921, the village of Oak Park adopted a comprehensive zoning ordinance covering practically the entire village. Petitioner owns lot 16, and 17 feet off the north side of lot 17, in block 14, in Austin Park subdivision. It is located on the west side of Lyman avenue. Lyman avenue extends north from Roosevelt Road. Roosevelt Road runs east and west. It is the south boundary line of the village of Oak Park. Austin Boulevard is the east boundary of the village. Austin boulevard is two blocks east of Lyman avenue. At a point 125 feet north of the north line of Roosevelt road, a 16 foot alley runs east and west, paralleling Roosevelt road. The first property in block 14 on the west side of Lyman avenue and north of the alley, is lot 18, and 8 feet off the south side of lot 17. Immediately north of this property is Petitioner's property, which is the north 17 feet of lot 17, and all of lot 16. The south line of Petitioner's property is 49 feet north of the south line of the alley. (R. 63.)

As platted, the lots south of the alley in block 14 extend north and south from the alley to Roosevelt road. This

tier of lots lying between the alley and Roosevelt Road extends from Austin avenue, which is the east boundary line of the village, to Harlem avenue, one mile west, which is the west boundary line of the village. This tier of lots is zoned as either commercial or industrial property. All of block 14, all of block 15 which is immediately east of block 14, the west half of block 16, which is east of block 15, and all of the property for several blocks north and west of block 14, except that portion lying between the east and west alley and Roosevelt road, is zoned as single-family residence property. In block 14 and block 15, however, there are three or four properties which are improved with two-family residences. These buildings were constructed, however, before the ordinance was adopted. (R. 63.)

Petitioner filed an application with the village authorities for a permit to remodel her home and make it into a two-family apartment building. This application was denied and the suit followed. Her property is an ordinary story-and-a-half residence, about 22 feet in width and extending back approximately 30 feet, a story and a half in height. Back of that is a one-story extension for some 12 feet to the west. The property fronts on the west side of Lyman avenue. The improvements contemplated in Petitioner's property involved the construction of a kitchen, bathroom and a bedroom on the second floor. One room on that floor was finished when the house was constructed. The improvements sought to be made also require cutting a dormer window through the south side of the roof and other internal changes so as to make the second floor a three-room apartment, consisting of a living room, bedroom, kitchen and bath. (R. 63-64.)

It was stipulated at the trial that at the time the zoning ordinance was adopted there were two two-family resi-

dences in the half block in which Petitioner's property is located. They are still so used. This half block consists of 18 lots, extending north from the alley already referred to. One of these two-family residences is about 125 feet north of plaintiff's property. The other is about 200 feet north of her property. Across the street to the east, in the west half of block 15, one of the multiple-family residences is located about 150 feet north of Petitioner's property and across the street, which is 66 feet wide. The other is practically at the extreme north end of the block. It is about 325 feet north of Petitioner's property and also across the street. It is also stipulated that both of these buildings were constructed prior to the passage of the zoning ordinance. The east half of block 16, which is the second block east of block 14, is zoned for industrial uses. Petitioner's witness also testified that at other points in the village, some distance from the block in which plaintiff's property is located, there are other properties in zoned residential districts devoted to multiple-family uses. He was able to point out, altogether, five such properties on Taylor avenue, which is a block and a half west of Petitioner's property, and a few others located at some distance from the block in which Petitioner's property is located. It is agreed, however, that there are only two two-family residences in block 14 north of the alley, and one or two in block 15. Petitioner claimed there were two, while the village record shows there is only one such property in block 15. (R. 65.)

The record shows further that in the east half of block 14, north of the alley, there are 18 lots, all of which, except the lot at the extreme north end of the block, are 25 feet in width. The north lot is somewhat wider. Five of these lots are vacant. Of the 31 improved lots, 17 are improved

with buildings on a single lot, while 14 contain buildings which are on parts of two or more lots. (R. 66.)

There was no proof in the record that the restrictions in the zoning ordinance are not necessary or are unreasonable to secure protection from fire, to insure adequate light and air, to conserve tax values or to prevent street congestion. Nor was there any proof in the record of diminution in the value of plaintiff's property because it is located in a residential zone. Nor was there any proof as to the effect which the conversion of her residence into a two-family residence would have on other property in the block. (R. 66.)

SUMMARY OF ARGUMENT.

I.

A.

A zoning ordinance of a municipality may validly forbid apartments or business buildings in residential areas.

Village of Euclid v. *Amber Realty Company*, 272 U. S. 365.

Zahn v. *Board of Public Works*, 274 U. S. 325.

The foregoing principle has been followed by state courts.

Sunny Slope Water Co. v. *Pasadena*, 1 Calif. (2) 87, 33 Pac. (2) 672.

Colorado Springs v. *Miller*, 95 Colo. 337, 36 Pac. (2) 161.

Strain v. *Mims*, 123 Conn. 275, 193 At. 754.

State Ex Rel Henry v. *Miami*, 117 Fla. 594, 158 So. 82.

Speroni v. *Board of Appeals*, 368 Ill. 568, 15 N. E. (2) 302.

Locatelli v. *Medford*, 287 Mass. 560, 192 N. E. 57.

Wippler v. *Hohn*, 341 Mo. 780, 110 S. W. (2) 409.

Romano v. *Ridgewood*, 14 N. J. Mis. R. 301, 184 At. 411.

B.

The complaint of the Petitioner filed in the trial court alleged that the ordinance was invalid (1) because of the presence of a commercial zone nearby and (2) because of the presence of other apartment buildings in the area.

Substantially all of the testimony offered in her behalf dealt only with those issues. The trial judge stated at the conclusion of the trial that he held with the Petitioner upon one of these issues.

The Petitioner has elected to abandon both of the foregoing issues in this court. She now relies upon an issue barely mentioned in her complaint and supported by but one sentence of testimony by her witness in the trial court.

The issue she raises here and dignified with such scant treatment in the trial court, is, to express her argument, that her home was "potentially" built for a two-apartment building when the zoning ordinance was passed; and that therefore she should be permitted to make such use of it now.

The physical condition of the house in question rebuts any possibility that it was designed for use as a two flat. Her contention is a mere subterfuge to evade the zoning ordinance. That her contention is a subterfuge is further supported by the fact that she occupied the house as a single family dwelling for 25 years after the passage of the zoning ordinance before making any effort to remodel it into a two flat. Had she considered the house a "potential" two flat, she would not have lost the advantage of 25 years rent from one of the apartments but would have converted the house to such use many years ago.

As a by-product of the foregoing argument, the Petitioner argues that the ordinance makes an unreasonable definition of a family. The same or substantially similar definitions of a family are found in zoning ordinances in all parts of the country where residential zones are created. Yet the Petitioner does not cite one case where such a definition has ever been found unreasonable by any court. Her further contention that the definition would not permit

a single family to have two kitchens is not supported by any reasonable construction of the ordinance.

C.

The authorities cited by the Petitioner do not support the issue she raises.

II.

The Petitioner Did Not Raise the Federal Question in the Trial Court or in the Illinois Supreme Court.

The complaint filed by the petitioner in the trial court did not specify upon which section of the constitution she relied. The decree of the trial court did not refer to the Constitution of the United States, directly or indirectly. The Petitioner has furnished no evidence that she argued a federal question in her brief in the Illinois Supreme Court. The Illinois Supreme Court did not refer to a federal question in its opinion. The petitioner's petition for re-hearing in the Illinois Supreme Court is in the record here. It did not mention a federal question. Upon familiar principles, the Petitioner may not now raise a federal question in the United States Supreme Court.

The burden is upon the party invoking the jurisdiction of the U. S. Supreme Court to make an affirmative showing that the federal question was raised in the state court.

Chicago, Ind. and L. R. R. Co. v. *McGuire,* 196 U. S. 128.

Where a court of review of a state court does not rule on a federal question, the U. S. Supreme Court will decline jurisdiction if the question was not raised in the trial court.

Mutual Life Ins. Co. v. *McGrew,* 188 U. S. 291.

Chicago, Ind. and L. R. R. Co. v. *McGuire,* 196 U. S. 128.

The particular clause in the U. S. Constitution and the rights claimed thereunder must unmistakably appear in the record of the proceedings in the state court.

Michigan Sugar Co. v. *Michigan,* 158 U. S. 112.

It is not sufficient to rely generally upon "the constitution of the United States."

Herndon v. *Georgia,* 295 U. S. 441.

A mere claim of denial of "due process" is insufficient.

Thomas v. *Iowa,* 209 U. S. 258.

Bowe v. *Scott,* 233 U. S. 658.

ARGUMENT.

I.

A.

A Municipality Has the Lawful Power to Enact a Zoning Ordinance Creating Residential Zones in Which Apartments and Business Properties Are Excluded.

Before discussing the merits of the Petitioner's contentions, let us refer briefly to the leading cases upon the authority of a municipality to exclude apartments and business properties from residential areas.

Probably the leading case upon the subject of the validity of zoning ordinances is *Village of Euclid* v. *Amber Realty Company*, 272 U. S. 365. That case, among other things, sustained the right of a zoning ordinance to forbid business buildings or multiple residences in residential zones. Subsequently, numerous state courts have held zoning ordinances valid which establish residential districts and forbid multiple family dwellings. Nearly all of the cases cite the Village of Euclid case and follow its principles. A few of these cases are the following: *Sunny Slope Water Co.* v. *Pasadena*, 1 Calif. (2) 87, 33 Pac. (2) 672; *Colorado Springs* v. *Miller*, 95 Colo. 337; 36 Pac. (2) 161; *Strain* v. *Mims*, 123 Conn. 275, 193 at 754; *State Ex Rel Henry* v. *Miami*, 117 Fla. 594, 158 So. 82; *Speroni* v. *Board of Appeals*, 368 Ill. 568, 15 N. E. (2) 302; *Locatelli* v. *Medford*, 287 Mass. 560, 192 N. E. 57; *Wippler* v. *Hohn*, 341 Mo. 780, 110 S. W. (2) 409; *Romano* v. *Ridgewood*, 14 N. J. Mis. R. 301, 184 at 411.

Subsequent to the Village of Euclid case, this court sustained the validity of a zoning ordinance of the City of

Los Angeles by the terms of which buildings for private businesses were excluded from residential zones. (*Zahn v. Board of Public Works*, 274 U. S. 325.)

B.

There Is No Merit in the Petitioner's Contentions and the Zoning Ordinance Was Not Unreasonable or Arbitrary.

As heretofore shown in the statement of the case, the principal issues at the trial of the case in the Superior Court of Cook County were whether the ordinance was invalid (1) because an adjoining area was zoned for commercial purposes and (2) because of the presence of certain multiple dwellings in the area in which the Petitioner's property is located. Substantially all of the testimony of the only witness for the Petitioner (who was also her attorney of record) dealt with those two issues. The oral statement of the trial judge at the conclusion of the case was that because of the first of the two aforesaid issues, the ordinance was invalid.

The Petitioner has abandoned those two issues in this court. She relies upon neither of them in either her petition or her brief. She now says that the two foregoing issues were not involved in the case. At p. 11 of her petition she says "Those were feigned issues and were not the contentions of petitioner." It is difficult to understand how the Petitioner has the temerity to make any such statement when (1) the two issues were raised in her complaint, (2) substantially all of the testimony given to support her complaint in the trial court dealt solely with them and (3) the statement of the trial judge at the conclusion of the case asserted that the ordinance was void because of one of them. She claims that the property was designed as a two apartment building in 1921; and

the sole issue she now advances is whether she may now convert the property into a two apartment building at this time. This issue was barely mentioned in her pleading in the trial court; and referred to in but one sentence in the testimony of her lawyer-witness.

The Petitioner asserts that the Illinois Supreme Court did not pass upon this issue. In that she is in error. The court did so and with logic that furnishes a complete answer to the merits of the Petitioner's argument. In disposing of the issue, the court stated in its opinion (R. 66-67) as follows:

> "It was contended by the attorney for plaintiff, in his testimony, and is so contended in his brief, that plaintiff's residence was architecturally designed for a two-apartment building when it was constructed prior to the time the ordinance was adopted. This contention, however, is not in any sense sustained by the evidence. The photograph of the residence in evidence shows that it is an ordinary one-and-a-half-story frame residence, approximately 22 feet wide by forty-two feet deep. It has a hip roof; the eaves come down to about the level of the second floor. The witness testified that at the time the house was built it had one room finished on the second floor with stairs leading to it from the entrance hall on the first floor. It has only one window in the front above the first floor, which appears to be an ordinary attic window. There is possibly a like window in the west end of the house, which does not show in the photograph. But to say that it was architecturally designed for an apartment on the second floor is not sustained by the record. It is simply an ordinary one-story residence with one room finished in the attic. According to the plans of the proposed reconstruction, in order to finish the balance of the attic so as to make it into suitable living quarters, it is necessary to cut a dormer window through the roof on the south side. That is the only way a window can be installed."

In addition to the foregoing, one of the strongest items of evidence that the Petitioner's property was not "potentially" designed for two family or multiple dwelling use is that the house was in existence in its present condition when the zoning ordinance was passed in 1921. (R. 2.) Yet it was not until shortly before this suit was filed in 1946 that the Petitioner decided to remodel the property as a multiple dwelling. It hardly seems possible that an owner of property would permit 25 years to pass without taking advantage of its "potentiality". One who erects a building with the intention of creating a two family dwelling is usually anxious to get the rent from both apartments as soon as possible. He does not suffer a loss of 25 years rent if his building is in truth and in fact a multiple dwelling which can be fitted for occupancy by two families by a small amount or remodeling.

Another factor which would lead any reasonable person to conclude that the property was never designed as a multiple dwelling are the extensive alterations that the Petitioner would have to make in order to provide for two family occupancy. Her complaint alleged that the permit she sought from the Village of Oak Park was to install a bedroom, bathroom and kitchen in the second floor, so that "the second floor could be used as a separate apartment". The necessity of making such extensive alterations as those negate any possibility that the property was ever designed for multiple dwelling use.

Almost any dwelling house can be converted into a two family dwelling by adding a bedroom, bathroom and kitchen on the second floor as the Petitioner has proposed here. In fact, large dwelling houses might be so converted into 3 or 4 family apartments.

To sustain any such contention as the Petitioner makes would lead to a complete circumvention of all zoning ordi-

nances. By means of the logic the Petitioner follows, any person with a one family residence in a residential zone might convert it into an apartment building for no other reason than it had four walls, a foundation and a roof. The most that can be said about the Petitioner's contention that her house is "potentially" suited as a multiple dwelling is that it has two floors, four walls and a stairway going from the first to the second floor.

It should be perfectly obvious to any person of common sense that the Petitioner's contention is barren of any real merit; and a mere subterfuge to violate the zoning ordinance of Oak Park by creating a two family family apartment out of an ordinary single family dwelling house. To quote the opinion of the Illinois Supreme Court, "But to say that it was architecturally designed for an apartment on the second floor is not sustained by the record. It is simply an ordinary one-story residence with one room finished in the attic."

As a by-product of the argument that the Petitioner's property is "potentially" suited for a multiple family dwelling, she makes the further argument that the ordinance makes an unreasonable definition of a family.

The definition of a family in the ordinance is, "any number of individuals living and cooking together as a single housekeeping unit."

Just how the Petitioner contends that the definition is unreasonable, she does not clearly state. She states at various places in her petition and brief that the necessary effect of the definition is to compel a family to cook in a single kitchen. For example, she says at p. 27 of her brief, "The question presented is whether under such a definition it is reasonable to restrict an ordinary American family group to one kitchen and require them all to cook together in order to use the residence and live in the dis-

trict." At p. 23 she asks whether or not "the restriction of one kitchen to a family" bears any reasonable relation to the police power.

Her argument fails because she reads something into the definition of a family that is not contained in it. There is nothing in the definition that provides that a family may use only one kitchen; and it is absurd to advance any such contention. Nothing in the definition of a family given in the ordinance says anything whatsoever about a single family being obliged to cook in one kitchen. It merely defines a family to be individuals "living and cooking together as a single housekeeping unit". What the Petitioner seeks is to create two separate apartments out of a single family dwelling. Her complaint avers that she applied to the Building Commissioner for a permit to install additional rooms on the second floor so that *"said second floor could be used as a separate apartment"* (R. 2-3); and that the outward appearance of the property will not be changed *"by the establishing of said three room apartment"*. (R. 3.)

Even though the definition of a family as set forth in the ordinance should be construed to limit a family to the use of one kitchen, the Petitioner would not be adversely effected. As just shown, what she is seeking from the Respondent by injunction is the right to convert her single family dwelling into a two flat. She does not seek to merely add a kitchen to her single family dwelling so that one family might use two kitchens. That is not the purpose of her injunction suit. What she seeks is an injunction to permit her to operate two apartments with complete and separate living facilities for two families; and not merely to add an additional kitchen for the convenience of one family.

The definition of a family in the Oak Park ordinance is

one in common use in zoning ordinances throughout the country. We will hazard a guess that the substance of the definition may be found in nearly every zoning ordinance creating residential zones. Yet the Petitioner does not cite a single case where such definition has been found unreasonable; or where it was construed to mean that a family might have but one kitchen. If the definition is so palpably unreasonable as the Petitioner claims it is, it is curious that in the scores of cases all over the country involving zoning ordinances, it never before occurred to counsel for any party to challenge its reasonableness.

In her conclusion that the ordinance prevents a family from having two kitchens, the Petitioner apparently relies upon an utterly false and erroneous construction of the case of *Harmon* v. *City of Peoria,* 373 Ill. 594. In her brief (p. 30) she quotes an isolated portion of the court's opinion consisting of dictum and then, without considering the context of the opinion, reaches her wholly unwarranted conclusion. An examination of the facts of that case show that the plaintiffs owned a two story house in a block in which more than one-half of the houses were used as multiple family dwellings or rooming houses. It was a typical "rooming house" block. The owners remodeled the second floor by adding two kitchens. As remodeled, the house was adapted for use as a three family dwelling. The owners intended occupying the first floor themselves and renting the two suites on the second floor to two couples. Considering the character of the majority of the other buildings in the block, the court held it was unreasonable for the city to forbid the owners to rent the two apartments on the second floor. The opinion clearly shows that what occasioned the court to hold the ordinance invalid was that the majority of the buildings in the block were already devoted to multiple dwelling or

rooming house use. In contrasting how the ordinance operated as applied to the plaintiff, the court pointed out (p. 373) that "the ordinance prohibits plaintiffs from renting their suites of rooms equipped with kitchen facilities to two couples" but it would not prevent any number of persons to occupy the house as a family and divide expenses, provided they lived as a solitary housekeeping unit with one kitchen. Manifestly what the court was doing was illustrating how unreasonable it was in this rooming house block to forbid the plaintiffs from renting out two small apartments with two kitchens to two couples, but to permit a large number of persons to share expenses and operate with but one kitchen; the prohibited use of two small apartments with two kitchens by two couples was to be contrasted with the permissible use of the same premises by a large number of persons living as one family with but one kitchen.

The court had no purpose or reason to say that a family might not have more than one kitchen any more than one bedroom or one bathroom or one dining room. There was no such issue in the case or anything that has the most remote connection with such an issue. The Illinois Supreme Court has never at any time placed any such construction upon the definition of the word family although scores of cases involving zoning ordinances have received its consideration; and so far as we can find, neither has any other court in this country.

C.

The Cases Cited by the Petitioner.

The Petitioner has cited the case of *Nectow* v. *Cambridge*, 277 U. S. 183. That case has no application to the case at bar; nor does it modify the law enunciated in the case

of *Village of Euclid* v. *Amber Realty Company* to the effect that a municipality may zone an area for residential purposes and forbid multiple family or commercial buildings in the area. In the Nectow case the facts showed a purely arbitrary classification whereby a large tract consisting of 140,000 square feet of land was placed in a residential zone without any reasonable basis whatsoever for the classification.

The petitioner has also cited the case of *Seattle Trust Co.* v. *Roberge,* 278 U. S. 116. That case likewise has no application to the case at bar. Neither does it amend anything said by the court in the Village of Euclid case. In the Seattle Trust Co. case, a home for old people was located upon a five acre tract of land. The court held that it was arbitrary and unreasonable for the City of Seattle to deny the trustee of the home an application to replace the home with a larger one upon the same tract by requiring the trustee to obtain the written consent of two-thirds of the property owners in the area.

In the case of *Merrill* v. *City of Wheaton,* 356 Ill. 457, the court held a zoning ordinance unreasonable which precluded a property owner from building a two apartment building in a block where 50% of the buildings in use were two apartment buildings and in which block boarding houses were also permitted.

In the case of *Anderman* v. *City of Chicago,* 379 Ill. 236, a very small tract was zoned for residential purposes. It was isolated and completely surrounded by property zoned for commercial and apartment use. The court held it was unreasonable under such circumstances to zone the small tract for residential use.

A reading of these and other decisions of the Illinois Supreme Court show that the Illinois Supreme Court has always been zealous to protect property owners from harsh

and unreasonable restrictions of zoning ordinances; and that the court has never hesitated to give relief to a property owner suffering from the unreasonable restrictions of such an ordinance.

On the other hand, the Illinois Supreme Court has been equally zealous in enforcing the broad principles and objectives of zoning ordinances. It has not permitted the purpose of zoning to be frustrated by such subterfuges as the Petitioner has endeavored to employ here.

II.

The Petitioner Did Not Raise the Federal Question in the Trial Court or in the Illinois Supreme Court.

At no place in her complaint did the Petitioner employ the phrases "constitution of the United States", or "the United States constitution." At but one place in her complaint did the petitioner use the word "Federal." That was in Par. 11 of her complaint where she averred that the action of the Oak Park officials in refusing her a permit "is illegal and in total disregard of plaintiff's rights in her property, and in contravention and in violation of both the State and Federal Constitution." (R. 4.) *It is important to note that the Petitioner did not specify upon which section of the two constitutions she relied.*

Later in her complaint (Par. 24), she alleged that the ordinance "takes and damages property of plaintiff without due process of law, and denies to the plaintiff equal protection of the laws and is therefore unconstitutional and void so far as it so operates". (R. 9.) It is also important to note that there is no connecting language between the two widely separated paragraphs of the complaint just referred to.

The decree of the trial court, entered at the instance of the Petitioner, makes no reference whatsoever to the Constitution of the United States. It adjudged that the ordinance "is unconstitutional and void" but did not state that it was the United States Constitution that was violated.

The Petitioner has not filed in the record here a copy of the brief she filed in the Illinois Supreme Court. The opinion of the Illinois Supreme Court does not refer to the Constitution of the United States; and does not show any claim by the Petitioner that she relied upon the Constitution of the United States. The petition for rehearing she filed in the Illinois Supreme Court makes no claim that any right of hers guaranteed by the U. S. Constitution has been violated. (R. 72-88.)

Thus the entire record in the State Courts of Illinois (both in the trial court and the Supreme Court) is bereft of any claim that the ordinance violates any guaranty under the U. S. Constitution; unless it could be said that the Federal question was raised and preserved by the nebulous claims of constitutional guaranty found in the two aforementioned unrelated paragraphs of her complaint.

The burden is upon the party invoking the jurisdiction of the Supreme Court of the United States to make an affirmative showing by the record that the federal question was raised in the state court. (*Chicago, Ind. and L. R. R. Co.* v. *McGuire*, 196 U. S. 128.) Where the court of review of the state makes no ruling upon a federal question, the U. S. Supreme Court will decline jurisdiction if it appears that the question was not raised in the trial court. (*Mutual Life Ins. Co.* v. *McGrew*, 188 U. S. 291-309; *Chicago, Ind. and L. R. R. Co.* v. *McGuire*, 196 U. S. 128-131.) In such case, in the absence of an affirmative showing to the contrary, the U. S. Supreme Court will infer that the question failed of decision in the state court because of its untimely

presentation. (*Chicago, Inc. and L. R. R.* v. *McGuire,* 196 U. S. 128-131.)

The particular clause in the U. S. Constitution and the rights claimed thereunder must unmistakably appear in the record of the proceedings in the state court. (*Michigan Sugar Co.* v. *Michigan,* 185 U. S. 112.) It is not sufficient to rely, generally, upon "the Constitution and the laws of the United States". (*Herndon* v. *Georgia,* 295 U. S. 441, 442, 443.) A mere claim of denial of "due process" without more is insufficient. (*Thomas* v. *Iowa,* 209 U. S. 258; *Bowe* v. *Scott,* 233 U. S. 658, 664, 665.)

Tested by the foregoing principles, the Petitioner did not raise or preserve the federal question in the state courts. The record is barren of the question having been raised in the Illinois Supreme Court in any form whatsoever, or of it having been preserved there if it was ever raised in the trial court.

Neither was the federal question presented in the trial court. The decree (entered by reason of the Petitioner having prevailed in that court) did not mention a federal question either directly or by the least inference; and certainly the pleadings filed by the Petitioner in the trial court did not sufficiently raise the question. She made no reference in her complaint to any particular clause of the Constitution of the United States. In the forepart of her complaint she alleged in general terms that the action of the village officials was "in violation of both the State and Federal Constitution." Under the decisions of this court, no federal question was raised by that allegation, the Petitioner having failed to specify upon which section of the Constitution of the United States she relied. Later in a far removed and unrelated part of the complaint, the Petitioner averred that the ordinance was unconstitutional

without averring to which constitution or to which section of either she referred.

We maintain that the Petitioner did not raise the federal question in the state court is conclusively established by the accumulated evidence of (1) the failure of the Illinois Supreme Court to mention it in its opinion, (2) the failure of the Petitioner to furnish evidence that she argued it in her brief in the Illinois Supreme Court, (3) the failure of her petition for rehearing to mention it, (4) the failure of the decree of the trial court to mention it, and (5) her failure to specify in her pleadings upon which section of the U. S. Constitution she relied. Had the Petitioner seriously intended to raise the federal question in the state courts, it would hardly seem possible that all five of the omissions just listed would have occurred.

It is true that there have been some cases, such as *New York ex rel. Bryant* v. *Zimmerman,* 278 U. S. 63, where this court has held that the federal question has been raised by a general allegation in the trial court that a statute is "unconstitutional." However, those are exceptional cases where, although the constitutional question was raised in but general terms in the trial court pleading, the specific federal constitutional question was raised by counsel and passed upon by courts of review of the state.

In the Bryant case the court held that since the New York courts of review had passed upon the Fourteenth Amendment, the judgment of the highest court of that state might therefore be reviewed by the U. S. Supreme Court.

In the case at bar, the federal question was not passed upon by the Illinois Supreme Court; and so far as the record is concerned, there is no evidence that the Petitioner ever raised or argued it in the Illinois Supreme Court.

Wherefore the Respondent submits this its brief in

opposition to the petition for a writ of certiorari and prays that said petition be denied.

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